No. 12,197

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE HAMILTON,
Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Reply Brief on Behalf of Appellant Louise Hamilton

ANTHONY J. KENNEDY,
CARL KUCHMAN,
Forum Building, Sacramento 14, Calif.,
GILFORD G. ROWLAND,
Forum Building, Sacramento 14, Calif.,
RICHARD ERNST,
111 Sutter Street, San Francisco 4, Calif.,
Attorneys for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 12,197

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE HAMILTON,
Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Reply Brief on Behalf of Appellant Louise Hamilton

This is in reply to respondent's brief filed June 27, 1949. We shall first correct certain of respondent's basic misstatements with respect to appellant's position and her admissions.

Appellant's basic position is that the Labor Board shows, on the face of its formal papers and as a matter purely of law, that there is no possible basis upon which it can find it has jurisdiction or authority to proceed in the case to which the subpoena was ancillary. Respondent asserts that appellant, in so defending against enforcement of the subpoena, seeks to litigate

"issues of law and fact which the Board has the power to decide and in fact must decide in the course of the administrative proceeding" (Resp. Br. 11). This is wholly erroneous. No issue of fact is before the court.

Respondent also asserts that appellant admits that the subpoena was issued in accordance with the statute. Appellant denies that it was so issued because the statute gives authority to issue a subpoena in a formal hearing only where a complaint has lawfully issued so that a proceeding is lawfully commenced.

Respondent also asserts that appellant admits that the evidence to be produced was relevant and material. Appellant asserts that it is not relevant and material to "any matter under investigation or in question before the Board, its member, agent, or agency conducting the hearing or investigation", but relevant only to a matter not before the Board.

I.

A CLEAR AND AFFIRMATIVE SHOWING OF NO POSSIBLE JURISDICTION OR AUTHORITY TO PROCEED IS AN APPROPRIATE DEFENSE TO THE ENFORCEMENT OF A SUBPOENA OF AN ADMINISTRATIVE AGENCY AND ONE THAT MAY BE OFFERED BY A WITNESS NOT A PARTY TO THE ADMINISTRATIVE PROCEEDING.

Appellant urges the court to refuse to enforce the subpoena on the ground that there is a clear and affirmative showing of no possible jurisdiction or authority in the Board to proceed.

Respondent does not meet this argument. Instead it argues that the court should not usurp the Board's function of considering the evidence as to its jurisdiction, making the inferences, and in the first instance finding the facts upon which its jurisdiction and authority must stand or fall. This argument, however, does not answer or contravene appellant's position; appellant has not asked the court to do any of these things.

Respondent's first point, that the witness has no standing to litigate the merits of the dispute or the facts as to jurisdiction as a defense against enforcement of the subpoena, similarly is groundless because appellant's defense is of a different nature.

A Person Who Is Not a Party to the Board's Proceeding May Defend Against the Enforcement of a Subpoena.

The Board has come into court to seek enforcement of its subpoena. Its application is based solely on the jurisdiction granted the District Court by Section 11 of the National Labor Relations Act.[1] This section provides that when a person refuses to comply with a subpoena of the Board the District Court "upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, and to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question." This provision does not require the District Court to enforce the subpoena. It gives the court jurisdiction to act on the Board's application. The court is not made a rubber stamp of every subpoena that the Board issues. "The statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court which is to be judicially exercised." *Goodyear Tire & Rubber Company v. Labor Board*, 122 F.2d 450, 453.

It is well established that in exercising its jurisdiction, the court must refuse enforcement where an "appropriate defense" is offered. *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375; *Federal Trade Commission v. Claire Furnace Co.*, 274 U.S. 160; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217.

A witness may resist the enforcement of a subpoena on numerous grounds. A witness may defend on the ground that the agency issuing the subpoena has acted arbitrarily or in excess of statutory authority. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216. He may submit that his privilege, such as that against self-incrimination, has been violated. See

1. The relevant portions of Sections 10 and 11 of the National Labor Relations Act are printed in Appendix A.

Boyd v. United States, 116 U.S. 616. He may defend on the ground that the subpoena is unduly vague or unduly burdensome. *Hale v. Henkel,* 201 U.S. 43. He may defend on the ground that subpoena was not issued by the person solely vested with that power by the statute. *Cudahy Packing Co. v. Holland,* 316 U.S. 357. He may defend on the ground that the subpoena related only to a "fishing expedition" and not to the trial of issues within the Board's jurisdiction. *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298; *Ellis v. Interstate Commerce Commission,* 237 U.S. 434. He may defend on the ground that the evidence sought is not germane to any lawful subject of inquiry in the administrative proceeding. *Harriman v. Interstate Commerce Commission,* 211 U.S. 407. He may defend on the ground that the hearing is not of the kind authorized by statute. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434. He may defend on the ground that the hearing in aid of which the evidence is submitted was terminated. *Jones v. Securities and Exchange Commission,* 248 U.S. 1. He may defend on the ground that the formal papers of the administrative agency and the record before the court show that there is no possible basis for jurisdiction or authority in the proceeding to which the subpoena is ancillary. *Perkins v. Endicott-Johnson Corp.,* 128 F.2d 208, 215, 224. He is not required to submit to the demand that he testify "if in any respect it is unreasonable or overreaching the authority Congress has given." *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 217.

The District Court is obliged, under the National Labor Relations Act and the cases, to consider a witness's defense and, if it be "appropriate", deny enforcement of the subpoena. And there is a further statutory duty on the court to consider a defense like that of appellant.

The Administrative Procedure Act provides a basic statutory provision with respect to the defenses to be considered by the court. Thus, Section 6(c) provides that the subpoena should be enforced "to the extent that it is found to be in accordance with

law." The paragraph of the Senate Report on this Act that deals with this provision in Section 6(c) reads as follows:

> "The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction."

Appellant merely asks the court to do what is required by the Administrative Procedure Act, Section 6(c) (printed in Appendix A). It asks the court to inquire generally into the legal and factual situation and submits this will show that the Board could not possibly find that it has jurisdiction.[2]

A Clear and Affirmative Showing of No Possible Jurisdiction or Authority to Proceed Is an Appropriate Defense of a Non-Party Witness.

Respondent argues, with numerous citations (Resp. Br. 5-9), that a witness cannot require a court that has been requested to enforce an administrative tribunal to consider evidence and decide the facts on which a claim of Board jurisdiction is based. This argument is not directed at appellant's position. None of its cases raised the type of a defense that a witness is entitled to make under the Administrative Procedure Act.

Most of the cases cited by respondent hold that there was jurisdiction to take and consider the evidence. In two cases, the court held the tribunal issuing the subpoena had jurisdiction over the issues to which it pertained. *Howat v. Kansas,* 258 U.S.

2. Respondent refers at length to comments of the Attorney General with respect to this Act when it was before Congress. Such comments, even if appropriate for consideration as to legislative intent, clearly cannot be used to contravene the language of the statute or the intent of Congress stated in the report accompanying the bill. In any event even his comments make no suggestion that a non-party witness cannot raise a defense such as that of appellant in this case.

181, 185;[3] *Fairfield v. United States,* 146 Fed. 508, 509. In two cases the court specifically stated the tribunal had jurisdiction at least to determine whether it had jurisdiction to act. *Blair v. United States,* 250 U.S. 273, 283; *Perkins v. Endicott-Johnson Corp.,* 128 F.2d 208, 213, 214. Two cases are grand jury cases decided on the authority of the *Blair* case upholding the general jurisdiction of the grand jury to investigate possible crimes. *United States v. McGovern,* 60 F.2d 880, *United States. v. Watson,* 262 Fed. 776. None of the other cases cited raises a question as to jurisdiction. The relevance and materiality of the evidence sought was the sole issue in *Nelson v. United States,* 201 U.S. 92, 115, and *Bevan v. Krieger,* 289 U.S. 450, 463-464, and it was the ground for refusing to testify in *Fairfield v. United States,* 146 Fed. 508, 509. In *United States v. Government of Germany,* 5 Fed. Supp. 97, it was asserted that the testimony was not material and the court found it was material. In *Bronson v. United States,* 32 F.2d 844, no question was raised as to the authority or jurisdiction of the Commissioner of Internal Revenue to carry on the proceeding in aid of which the subpoena was issued.

The opinion in *Blair v. United States,* 250 U.S. 273, clearly shows it is not determinative of this appeal. This case had to do with the general inquisitorial powers of the grand jury, not with the trial of a specific unfair labor practice raised by a specific complaint in a specific proceeding of a tribunal of limited jurisdiction.[4]

---

3. Respondent refers to a dicta that indicates there may be an alternative ground for the court's decision. The opinion indicates that there are two definite grounds that the court relies upon for its decision. The relevant portions of the opinion are quoted in Appendix B.

4. The appropriate meaning to be given to *Blair v. United States* is apparent from the following quotation from *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 216, discussing the limitations on the right of an administrative agency in exercising its investigative functions of searching out violations with a view of securing enforcement of the statute:

> "These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited * * * by forecasts of the probable result of the investigation * * *' *Blair v. United States,* 250 U.S. 273, 282."

The Court relied on the nature of the grand jury. It discussed the history of the grand jury, its general inquisitorial function as developed through centuries of Anglo American jurisprudence, its judicial nature, and concluded: "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, of the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." (250 U.S. 273, 282). The Court furthermore specifically held that the grand jury did have authority and jurisdiction to take the evidence involved in this case; it stated, "The court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." (250 U.S. 273, 283).

The weakness of respondent's argument is even more obvious in its reliance on the *Endicott-Johnson* case,[5] which apparently is chiefly relied upon by respondent for it is referred to on pages 7, 9, 12, 13, 14, 15, 16, 17, 19, 21 and 22 of its brief. The Court of Appeals opinion clearly states the distinction between the cases relied upon by respondent and the position taken by appellant on this appeal. While that case holds that the courts should not make an independent investigation of the facts on the basis of which jurisdiction is claimed by an administrative agency that has issued a subpoena, it clearly upholds and sustains the right of a witness to defend on the ground presented here and declares that appellant's defense to the issuance of the subpoena involved herein is full and complete.

The Supreme Court, in holding that the subpoena should be enforced, pointed to the fact that the District Court had over-

5. *Perkins v. Endicott-Johnson Corp.*, 128 F.2d 208, affirm'd sub nom *Endicott-Johnson Corp. v. Perkins*, 317 U.S. 501.

ruled the contention of the Secretary of Labor that it was for her to decide the factual issue as to coverage and had itself tried this question. The Court held that the determination of that issue was primarily the duty of the Secretary and not of the District Court. "The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions." (317 U.S. 501, 509).

Appellant here has not asked the District Court to make the mistake the lower court made in the *Endicott-Johnson* case. Appellant here has directed the court solely to the formal papers of the Board and to the narrow questions of law there presented. The court was not asked to take evidence or otherwise to take over the Board's function of making initial findings of fact. Nor was the court asked to disregard the Congressional mandate that the Board's findings of fact are to be accepted if supported by evidence. The Board's allegations of fact are accepted in this proceeding as if they were findings supported by evidence; clearly there is no invasion of the Board's primary jurisdiction or substitution of the court's judgment for that of the Board. The issues being solely of law, they are issues that in any event are to be decided by the courts and not by the Board.

It is also most significant that the Circuit Court of Appeals supported its decision in the *Endicott-Johnson* case by stating that a subpoena could not be enforced where a defense like that of

appellant herein was presented. Thus it stated (at 121 F.2d 208, 215):

> "When * * * a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer —is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena."

Again it stated (p. 224):

> "As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena. And the same result would follow if an administrative order for hearing under the Walsh-Healey Act, or the plaintiff's pleadings in the subpoena suit, explicitly stated (1) that the defendant was not a contractor with the government, or (2) that the contract did not contain the required statutory stipulations, or (3) that the contract was of a kind explicitly excluded by §9, from the operations of the Act. Admittedly there is no such *affirmative defect* here." (Emphasis added.)

Respondent also refers to *Labor Board v. Northern Trust Company,* 148 F.2d 24, 27. The sharp contrast between the issue in that case and the issue in the present appeal clearly shows the case is not in point and that respondent has not even attempted to meet the issue presented by appellant. In that case a witness opposed enforcement of a subpoena in aid of a proceeding regarding an alleged unfair labor practice of a bank. The witness contended that no unfair labor practice of a bank could possibly affect interstate commerce and so the subpoena should

not be enforced. The court did not enforce the subpoena on the ground, *relied on by respondent herein,* that the witness had no right to raise such a defense. Instead the court held that the defense was not made out because the bank's unfair labor practice could affect commerce and so the Board had jurisdiction to consider the issues raised. By considering this defense, the court recognized that there was a right to make it.

In the *Northern Trust* case, the court enforced the subpoena because there were factual issues that might be decided so as to give jurisdiction to the Board.

The present case is different. It presents no factual issue to the court. As in the *Endicott-Johnson* examples of situations where a subpoena would not be enforced, the Board's admissions and the facts on the face of the Board's formal papers show the "affirmative defect" that there could be no possible basis upon which the Board can find facts giving it authority and jurisdiction. There is, therefore, no basis for enforcing the subpoena.

II.

THE 1947 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT GO TO THE JURISDICTION OF THE BOARD.

Appellant asserts that the 1947 amendments to the National Labor Relations Act cut down the jurisdiction of the Board.

> "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. * * * The powers of departments, boards and administrative agencies are subject to expansion, contraction, or abolition at the will of the legislative and executive branches of the government." (*Stark v. Wickard,* 321 U.S. 288, 310.) (Emphasis added.)

Appellant relies on statutory provisions that are integral parts of the sections that grant the Board jurisdiction where certain express conditions are met. The sole basis for the Board's juris-

diction is provided in Sections 9 and 10 of the Act.[6] They provide that a complaint may issue, and that issuance of a complaint gives authority or jurisdiction to hold formal hearings like that involved herein, only if the following conditions are met:

1. The unfair labor practices described in the complaint affect commerce.

2. A charge of the unfair labor practice has been filed with the Board.

3. Where the charge is filed by a union, it has complied with the non-Communist affidavit provisions of Section 9(h).

4. Where the charge has been filed by a union, it has complied with the information requirements of Section 9(f) and (g).

5. A charge stating the unfair labor practice has been served upon the person allegedly guilty within six months after it occurred.

The foregoing conditions to the exercise of jurisdiction to proceed to a hearing are imposed in substantially the same type of language. If there is any material difference in the language, that used in the 1947 amendments establishing the conditions numbered 3, 4 and 5 is more clearly jurisdictional.

The general grant of jurisdiction is in the following provisions of Section 10:

> "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *
>
> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent

6. The relevant excerpts from these sections are printed in Appendix A.

> or agency, as a place therein fixed, not less than five days after the serving of said complaint: PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *"

This means that the Board has jurisdiction only if the unfair labor practice affects commerce. "Thus the yardstick for determining whether the Board has jurisdiction * * * is the existence of interstate commerce." *Labor Board v. Northern Trust Co.,* 148 F.2d 24, 27.

Furthermore, this is the language that also makes the filing of a charge go to the Board's jurisdiction. "It is well settled that * * * a charge is necessary to set the machinery of an inquiry in motion * * * and that once a charge is filed the Board's jurisdiction attaches." (Resp. Br., p. 11, note 8). Respondent's admission is well supported by authority holding the filing of the charge goes to the Board's jurisdiction. *Labor Board v. Hopwood Retinning Co.,* 98 F.2d 97, 101; *Labor Board v. National Licorice Co.,* 104 F.2d 655, 658; App. Br. 28, 29.

It being well established, and substantially admitted by respondent, that the references to interstate commerce and to the filing of a charge go to the jurisdiction and authority of the Board, the contention that the 1947 amendments relied upon by appellant do not equally go to the jurisdiction or authority of the Board is too esoteric for legal comprehension. Thus, the above quotation, *which gives jurisdiction or authority to commence proceedings only upon issuance of a complaint,* concludes with the exception reading as follows: "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." If there is no power at law to issue a complaint because no charge has been filed or because it does not refer to "such an unfair labor practice" (to-wit, one "affecting commerce") or otherwise, the Board can have no jurisdiction or authority over the issues.

The language of Section 9 goes equally to the jurisdiction and authority of the Board; it provides, "*No complaint shall be issued* pursuant to a charge made by a labor organization under subsection (b) of Section 10 unless" the requirements of subsection (f) are met. And again, "*No complaint shall issue* under Section 10 with respect to a charge filed by a labor organization unless" the requirements of subsection (g) are met. And again, "*No complaint shall be issued* pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless" the requirements of subsection (h) are met.[7]

None of the cases cited by respondent militate against the proposition, obvious upon the face of the statute, that the five requirements stated above go to the jurisdiction and authority of the Board. Respondent's citations are not in point; none involves the National Labor Relations Act. The cases cited by appellant, and in fact respondent's own admission with respect to the charge, clearly confirm the obvious fact that the requirements do go to the jurisdiction and authority of the Board.

It is further apparent, from the language of the Circuit Court of Appeals in the *Endicott-Johnson* case quoted above at page 9, that a witness will not be required to testify in a proceeding as to which the Board admits that any condition like all five of these has not been satisfied.

III.

THE FACE OF THE FORMAL PAPERS OF THE BOARD AND THE ADMISSIONS OF THE BOARD IN THE DISTRICT COURT CLEARLY AND AFFIRMATIVELY SHOW THAT THERE IS NO POSSIBLE JURISDICTION OR AUTHORITY TO PROCEED IN THE CASE TO WHICH THE SUBPOENA WAS ANCILLARY.

The Board asserts, in a long footnote (Resp. Br. 11), that there may be a dispute as to some of the affirmative jurisdictional defects pointed out by appellant. These several "affirmative defects" will be taken up in the order followed in appellant's principal brief.

---

7. The relevant portions of Section 9 are printed in Appendix A.

1. No Charge Was Served Within Six Months of the Occurrence of the Alleged Unfair Labor Practices.

The Board can not find, and does not contend, that a charge was served before February, 1948. However, the Court might gain the impression that there may have been an earlier service in view of respondent's statement beginning: "Again, even if there had been no service of the charge before the effective date of the 1947 amendments to the Act" (Resp. Br. 11). The implication is totally without foundation, either in fact or even in the contentions of the Board. Thus the Board's formal papers show that the only basis for the proceeding lies in the charges dated January 26, 1948 (R. 31-36); furthermore, there is nothing in the record before the Court or in the formal papers that even suggests that the Board relies upon any other charge.

Respondent also suggests it might have jurisdiction to commence a proceeding by the issuance of a complaint after the effective date of the 1947 amendments although no charge was served within six months of the alleged unfair labor practice. This suggestion is totally without foundation. The statutory language reads:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof."

Respondent urges that this language does not apply if there was service within six months of the effective date of the statute. The Labor-Management Relations Act gives no basis for this proposition, for it specifically provides that the withdrawal of power to issue a complaint was to be effective two months after the enactment of the statute. *Labor-Management Relations Act—1947,* Sec. 104.

Respondent seeks to avoid this clear statutory provision. It asserts that an artificial and contrary effect is possible if the

Labor-Management Relations Act is construed like a statute of limitations passed by a state legislature and if, in addition, it is construed according to a rule of constructing such statutes that would not in any event be applicable in a situation like that here presented.

Respondent's argument not only flies in the face of the statutory language but is wholly without basis for several reasons.

First. Congress, in distinction to state and territorial legislatures, has plenary power to take away a statutory right it has given by depriving the courts or administrative tribunals of jurisdiction to consider claims based on such rights or by other method Congress deems appropriate. *Stark v. Wickard,* 221 U.S. 228, 309; App. Br. 25-27; *Seese v. Bethlehem Steel Co.,* 158 F.2d 58;[8] *Attallah v. B. H. Hubbert & Son,* 168 F.2d 993, cert. den. 335 U.S. 868; *Battaglia v. General Motors Corp.,* 169 F.2d 254, 258-259; *Fisch v. General Motors Corp.,* 169 F.2d 266, cert. den. 335 U.S. 902.

Second. This Act may not be interpreted as if it were a statute of limitations cutting down the time for suing on a private right. An unfair labor practice proceeding is inherently different from an ordinary action in court. The difference is fatal to respondent's argument. A proceeding on an unfair labor practice before the National Labor Relations Board is not a litigation of private rights. The Board carries on proceedings to protect the public's interest against labor disputes affecting commerce. It does so in the fashion directed by Congress. Its orders are for the protection of the public; any effect on private rights is purely incidental. Thus no individual has a right to compel the Board to take action on a charge filed or to stop the Board's action once a charge has been filed, or to take an order directing that he be given back pay into the Court of Appeals for enforcement, nor has he standing to compel the Board to seek such

8. It is to be noted that in the *Seese* case the court referred to the "more than one hundred decisions of the Federal District Courts and state courts" upholding such action of Congress in the *Portal-to-Portal Act.*

enforcement (App. Br. pp. 24-27). Even a state legislature, giving consideration to the "public benefit which would result if enforcement officers spent their time on fresh claims rather than stale ones" and the "valid public purpose in limiting the expenditures of time and money in the effort to enforce stale claims" (31 C.2d 210, 216, 217), may immediately cut off an existing remedy of a state agency.

> "The power of the Legislature to lessen a statute of limitations is subject to the restriction that an existing right cannot be cut off summarily without giving a reasonable time after the act becomes effective to exercise such right. (See *Davis & McMillan v. Industrial Acc. Com.*, 198 Cal. 631, 637 [246 P. 1046, 46 A.L.R. 1095].) This principle, however, does not apply where the state gives up a right previously possessed by it or by one of its agencies. Except where such an agency is given powers by the Constitution, it derives its authority from the Legislature, which may add to or take away from those powers, and therefore, a statute which adversely affects *only* the right of the state is not invalid merely because it operates to cut off an existing remedy of an agency of the state."
>
> *California Employment Stabilization Commission v. Payne*, 31 C.2d 210, 215, 187 Pac.2d 702, 705.

Since the National Labor Relations Act gives an individual no right of action but only a privilege of calling a violation to the attention of the agency and since the agency alone has any right to commence, continue, discontinue and conclude proceedings before the Board or proceedings to enforce a Board order, a Congressional dictate to the agency as to what cases shall be processed does not have the effect of cutting off any private rights, for none can develop until a court orders back pay.

Third. Even if this were an ordinary lawsuit between private individuals, the rule suggested by respondent would have no application. Respondent relies on *Carscadden v. Alaska*, 105 F.2d 377. In that case the court applied the rule referred to by respondent with respect to a cause of action for which the period

of limitations was reduced from ten to seven years. The court pointed out that if the statute were not construed in the fashion referred to by respondent here, a literal interpretation of the statute reducing the period of limitations "would have the effect of absolutely barring" an action that accrued more than the limited time prior to enactment. In the present case, such an effect was precluded by the statute itself so an interpretation to give this effect would be redundant. Thus the Labor-Management Relations Act allowed a period of two months for the issuance of complaints based upon stale unfair labor practices. Such a time having been allowed, there was a reasonable time granted for taking care of existing claims. A statute, even of a state legislature, may "bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." *Meigs v. Roberts,* 162 N.Y. 371; *Turner v. New York,* 168 U.S. 90; *Saranac Land & Lumber Co. v. Roberts,* 177 U.S. 318; *Davault v. Essig,* 80 C.A.2d 970, 973. On this ground that the reason for the *Carscadden* interpretation is wholly absent—in addition to the grounds based on public character of the rights involved and on their purely statutory source and on Congress's unlimited power to take them away—there clearly is no basis for applying the strained interpretation of the *Carscadden* case.

2. No Charge, Within the Meaning of the Law, Was Ever Filed.

Respondent does not suggest any answer to appellant's position that the "charge" relied upon in the formal papers before the Board is not a charge within the meaning of the Act. There is nothing in the record before this Court or in the Board's formal papers to contravene the fact that the Board solely relies upon the purported charges incorporated in its formal papers and in the record before this Court.

Respondent's contention that the Board once had jurisdiction to issue a complaint based on the filing of a charge before passage of the amendments ignores the power of Congress to take away any jurisdiction to commence a proceeding that has been granted.

3. The Board Has Failed and Refused to Raise Any Issue of Fact with Respect to Whether the Charging Union Has Complied with Subsections (f), (g) and (h) of Section 9 and so Cannot Possibly Find Such Compliance.

Respondent in its brief indicates that there might be an issue of fact with respect to the lack of compliance asserted by appellant (App. Br. pp. 32-41). Nothing in the Board's formal papers or in the record in this Court gives any basis for the Board's contention in this Court that there has been compliance. Appellant submits that, in view of this state of the formal papers and the Board's refusal to consider evidence on these issues, this ground is a full defense to enforcement of the subpoena, in any event until the Board amends its pleadings to show that the Board claims compliance by the charging union somewhere in its formal papers or in the record in the District Court.

Appellant also asserted (App. Br. 34), and this is not answered, that non-compliance is obvious upon the face of the formal papers because the charging union claims affiliation with the Congress of Industrial Organization and its refusal to comply is a matter of which this Court may take judicial notice.

4. The Formal Papers Include No Allegations of the Facts Necessary to Establish the Board's Jurisdiction Under the Act as Amended in 1947.

Appellant pointed out several obvious jurisdictional deficiencies in the formal papers of the Board and clearly demonstrated that a tribunal of limited jurisdiction can have no jurisdiction over a proceeding unless the facts supporting its jurisdiction are alleged in the papers upon which the proceeding is based (App. Br. pp. 41, 42). Appellant's only answer—that the witness is not entitled to call the attention of the court to the obvious lack of jurisdiction apparent on the face of these papers—has been shown to be wholly without merit (supra, pp. 2-10).

5. The Board Has No Jurisdiction Because a Complaint Has Never Lawfully Issued.

For the reasons stated above, it is obvious that there never was jurisdiction or authority to issue a complaint and that the purported issuance of a complaint was wholly outside the statutory authority of the agency. Respondent offers no argument that the Board has jurisdiction where there was no power to issue a complaint.

IV.

THE BOARD IS NOT ENTITLED TO ENFORCEMENT OF THIS SUBPOENA MERELY BECAUSE IT MIGHT HAVE JURISDICTION IN SOME OTHER PROCEEDING ON SOME OTHER UNFAIR LABOR PRACTICE COMPLAINED OF IN SOME OTHER CHARGE AND COMPLAINT.

Respondent's position resolves itself into a claim that the subpoena should be enforced merely because the Board might have jurisdiction in some other case and that the court should ignore the clear and affirmative showing that the Board has no possible jurisdiction in this case. Thus, respondent asserts (Resp. Br. 17):

> "There is no contention here that the Board lacked jurisdiction or authority to initiate, entertain and decide cases of the same general type and class as the proceeding in which the subpoena was issued. Indeed, that proceeding is an ordinary unfair labor practice case in which appellant's employer is charged with having engaged in an unfair labor practice by discharging employees because of union activities."

This argument proves too much. It would require the court to enforce a subpoena merely because an unfair labor practice was charged. As we have shown above, the statutes and cases provide that there shall be no such "rubber-stamp" enforcement. Enforcement must be refused where it affirmatively appears that the alleged unfair labor practice does not affect commerce or that a charge has not been filed or where other "affirmative defect" appears.

Before a subpoena will be enforced, there must be some possibility that the Board can show jurisdiction or authority to proceed. We submit that *a person may rightfully demand,* when called upon to testify in a formal proceeding based upon specific formal papers and with respect to a definite unfair labor practice, *that the Board show there is such a possibility of jurisdiction with respect to the particular proceeding in aid of which enforcement of the subpoena is sought.* The basis for enforcement must be found in the realities of this case, not in some fictitious unfair labor practice complained of in some fictitious formal papers and in litigation in some fictitious proceeding, all existing solely in the imagination of the Board. With such a fictitious case and such a fictitious basis for a subpoena, this Court is not concerned.

CONCLUSION

Appellant has conclusively demonstrated on several independent grounds that the Board's formal papers show it is completely impossible for the Board to find that it has any jurisdiction in the proceeding involved. This "affirmative defect" in the Board's proceeding requires this Court, we respectfully submit, to reverse the decision of the District Court and order that the Application for Enforcement of the Subpoena be dismissed and that the Order to Show Cause be quashed.

Dated: San Francisco, July 7, 1949.

Respectfully submitted,

ANTHONY J. KENNEDY,
CARL KUCHMAN,
GILFORD G. ROWLAND,
RICHARD ERNST,
Attorneys for Appellant.

(APPENDICES FOLLOW)

APPENDIX A

Excerpts From Labor-Management Relations Act

SEC. 9(f). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure fol-

lowed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by an illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

SEC. 10(a). The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is consistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes,

shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person

being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In the case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Section 6(c) of the Administrative Procedure Act provides:

"Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement of showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

APPENDIX B

Howat v. Kansas, 258 U.S. 181, 184-186,

reads as follows:

"In No. 154, Howat and the other plaintiffs in error were subpoenaed to appear before the so-called Court of Industrial Relations to testify in an investigation into conditions existing in the mining industry in Cherokee and Crawford Counties. They failed to appear. The powers of the tribunal in such a case are set forth in §11 of the act, reading in part as follows:

> " 'Said Court * * * shall have the power and authority to issue summons and subpoenas and compel the attendance of witnesses and parties * * * and to make any and all investigations necessary to ascertain the truth in regard to said controversy. In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena.'

"Under this section, the board made application to the District Court of Crawford County, the court of first instance of general jurisdiction in that county, to issue an order directing the plaintiffs in error to attend the board and testify. This order was issued, duly served and disobeyed. The contemnors were then brought into court by attachment. Their plea that the legislation under which they were subpoenaed was void was held to be insufficient and they were committed to jail until they should comply with the subpoena. The contemnors appealed to the Supreme Court of the State, which affirmed the action of the District Court holding that, without regard to the validity of the particular provisions of the Industrial Relations Act of which they complained, they were under legal obligation to obey the subpoena and were in contempt for not doing so. The court invited attention to §28 of the act, which provides that, "If any section or provision of this act shall be found invalid by any

court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court;" and pointed out that, even if the compulsory features of the act, to the constitutionality of which the plaintiffs in error objected, were invalid, there still remained in the act provision for investigation and findings by the Industrial Relations Court, in respect to which the power of the Legislature was indisputable and in furtherance of which the machinery for compelling the attendance and testimony of witnesses was appropriate. The court relied on the decision of this court in respect to a similar provision in the Interstate Commerce Law in which the Interstate Commerce Commission was authorized to secure attendance of witnesses at any investigation by it, through a proceeding before a Circuit Court of the United States. *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 448, 449. It would seem to be sustained also by the decision of this court in *Blair v. United States,* 250 U.S. 273, wherein it was held that a witness summoned to give testimony before a grand jury in the District Court of the United States was not entitled to refuse to testify, when ordered by the court to do so, upon the plea that the court and jury were without jurisdiction over the supposed offense under investigation because the statute denouncing the offense was unconstitutional.

"But even if we did not agree with the state court on this point, what we have said shows that the case was decided and disposed of by that court without any consideration of the application of the Federal Constitution to the features of the Kansas statute of which complaint is made. Even if those features are void, these contempt proceedings the state court sustains on general law. We can not, therefore, consider the federal questions mooted and assigned for error. *Southern Pacific Co. v. Schuyler,* 227 U.S. 601, 610; *Leathe v. Thomas,* 207 U.S. 93, 98; *Giles v. Teasley,* 193 U.S. 146, 160; *Hopkins v. McLure,* 133 U.S. 380, 386; *Hale v. Akers,* 132 U.S. 554, 564."